jurisdiction and then dictate how that court should conduct its review on the merits, however, has little to do with whether parties can limit the number of federal courts whose jurisdiction the parties may invoke in the first place.

In addition, most of the cases MACTEC cites in support of its supposed circuit conflict involved contracts that increased—rather than, as here, decreased—the availability of federal court intervention in the arbitration process. In that respect, too, those cases are off-point. When parties try to expand federal review, courts must consider the danger that increased scrutiny will "jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Kyocera*, 341 F.3d at 998. Courts also have expressed concern that expanded review will "reduce[] arbitrators' willingness to create particularized solutions" based on their "specialized experience and knowledge" because of "fear the decision will be vacated by a reviewing court." *Bowen* 254

Roadway Package Sys. v. *Kayser*, 257 F.3d 287, 292 (3d Cir. 2001) ("[P]arties may agree that judicial review of an arbitrator's decision will be conducted according to standards borrowed from state law."); *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 933 (10th Cir. 2001) (arbitration agreement providing that award be reviewed to determine whether "supported by the evidence"); *Syncor Int'l Corp.* v. *McLeland*, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (*per curiam*) (arbitration agreement providing for *de novo* review of arbitrator's legal conclusions); *Gateway Techs., Inc.* v. *MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995) (arbitration agreement providing for *de novo* review of errors of law); *New England Utils.* v. *Hydro-Quebec*, 10 F. Supp. 2d 53, 61 (D. Mass. 1998) ("Hydro-Quebec argues that this contractual language establishes this Court's standard of review . . . ."); *cf. Prescott* v. *Northlake Christian Sch.*, 369 F.3d 491, 497 (5th Cir. 2004) (remanding case to determine whether parties intended arbitration provision "to expand the scope of judicial review"); *Schoch* v. *InfoUSA, Inc.*, 341 F.3d 785, 789 n.3 (8th Cir. 2003) (reserving question whether parties may contract for *de novo* review of arbitration award); *UHC Mgmt. Co.* v. *Computer Scis. Corp.*, 148 F.3d 992, 997-998 (8th Cir. 1998) (same); *Chicago Typographical Union* v. *Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (stating that "federal jurisdiction cannot be created by contract" and courts must apply established standard of review).

F.3d at 936. Limiting judicial review, as here, raises none of those concerns.

The decision below is also entirely consistent with the Second Circuit's holding in *Hoeft* v. *MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003), as the court of appeals explained (Pet. App. 12a-13a). In *Hoeft*, the Second Circuit refused to enforce an agreement that made an arbitration award "not subject to any type of review or appeal whatsoever." 343 F.3d at 63. In those circumstances, "a court is asked to enforce an arbitration award without being given the authority to review compliance of that award with the FAA." Pet. App. 13a. In that respect, the contractual provision in *Hoeft* resembled those at issue in the other cases noted above, where the parties invoked a court's jurisdiction and then, in effect, sought to dictate how the court would go about its business. The single-layer-of-review provision in this case presents none of those concerns about the integrity of any court's proceedings. The parties here merely sought a middle ground regarding judicial review—permitting the district court to review fully the arbitrator's award but limiting the cost of litigation by prohibiting any appeal from the district court's judgment.

2. MACTEC's second proffered circuit split (Pet. 24-26) is even more tenuous than its first. MACTEC claims that the Tenth Circuit, when interpreting the term "nonappealable" in the nonappealability provision, applied "federal common law" (Pet. i) rather than the California law that governed the Agreement, thereby placing itself in conflict with the decisions of the Fifth Circuit and this Court. That is incorrect: the court of appeals nowhere invoked federal common law. It cited one prior Tenth Circuit case, *Bowen*, to distinguish the "final and nonappealable" language in this case from the "final" language in *Bowen*. Pet. App. 14a. But the Tenth Circuit did not suggest that it was basing its decision on federal common law, and since the result would have been the same under California law, there is no reason to infer that it did. And MACTEC's claim is without merit in any event. Even if California law could ever permit the in-

troduction of extrinsic evidence to show that "nonappealable" really means "appealable,"[5] MACTEC has waived this point by failing—both in this Court and the court of appeals—to proffer, or even suggest, any evidence to that effect about the meaning of this contract.[6]

* * * * *

MACTEC and Gorelick have arbitrated their case before an arbitrator; MACTEC has sought and received the review of a federal district court; the district court has confirmed the award in favor of Gorelick; and the Tenth Circuit has dismissed MACTEC's appeal. Now MACTEC seeks further review, and further delay, in this Court. This litigation should have ended years ago, and it should end now. "The promise of arbitration is spoiled if parties disappointed by its results can delay the conclusion of the proceeding by groundless litigation in the district court followed by groundless appeal to this court[.]" *Hill* v. *Norfolk & W. Ry.*, 814 F.2d 1192, 1203 (7th Cir. 1987).

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[5] In fact, California law makes clear that a court need not admit extrinsic evidence unless the evidence proffered shows "a meaning to which the language of the instrument is reasonably susceptible." *Brinton* v. *Bankers Pension Servs., Inc.*, 90 Cal. Rptr. 2d 469, 475 (Ct. App. 1999) (upholding trial court's denial of party's attempt to submit, on summary judgment motion, declarations claiming narrower understanding of agreement); *see also Producers Dairy Delivery Co.* v. *Sentry Ins. Co.*, 718 P.2d 920, 925 (Cal. 1986); *BMW of North Am., Inc.* v. *New Motor Vehicle Bd.*, 209 Cal. Rptr. 50, 57 n.4 (Ct. App. 1984).

[6] Also, MACTEC's own intentions could have no logical relevance to this question, since it was another company, not MACTEC, that agreed to the nonappealability clause in 1994, before MACTEC assumed that company's obligations under the Agreement in 1997.

CONCLUSION

The petition for a writ of certiorari should be denied.

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FEBRUARY 2006

(3)

No. 05-926

IN THE

Supreme Court of the United States

MACTEC, INC.,

Petitioner,

v.

STEVEN GORELICK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF[1]

In his Brief in Opposition, Gorelick does not -- and cannot -- dispute that there is a clear, acknowledged and persistent conflict among the courts of appeal on an issue of great importance to the legal and business community: whether pre-dispute agreements may alter the statutory standards for judicial review of arbitration decisions. What Gorelick contends instead is that resolving this case will not resolve the raging conflict below. Each of Gorelick's arguments is without merit, as discussed briefly below.

Initially, unable to contest the worthiness of this case for this Court's review on the legal issue presented, Gorelick attempts to gain sympathy on the facts with a narrative giving his side of the story. Yet the superficial persuasiveness of Gorelick's narrative carries with it an irony that exposes the substantive error in the arbitration and the district court's decision. In trying to explain why it made sense for MACTEC to agree to pay him millions of dollars for technology that is in the public domain, Gorelick is compelled to cite "evidence" that gives some context to the parties' agreement. MACTEC vehemently disputes the existence and import of Gorelick's "evidence,"[2] but for

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[1] The Rule 29.6 corporate disclosure statement filed with the petition remains accurate.

[2] Gorelick asserts that he "accepted a much lower amount per well ($1500 rather than $3000) in exchange for MACTEC's agreement to pay for any type of well installed – not just wells using the NoVOCS technology." (Brief in Opposition, p. 2). MACTEC, however, was prohibited from presenting evidence that that the deal agreed to was to *double* the types of wells (from one type of well to two types of well (UVB in addition to NoVOCS)) but at the same time *halve* the price per well (from $3,000 to $1,500), keeping the overall anticipated payment amount the same. Under MACTEC's interpretation, the revision to the

(footnote continued on next page)

present purposes Gorelick's narrative proves the point: even without the benefit of specific and controlling California precedent requiring that such evidence always be considered to determine whether the contract is ambiguous,[3] in this case the complexity of the transaction makes a fair hearing impossible unless some evidence is heard on the economic realities of the agreement and the parties' actual intent.

This is not a case challenging the normal deference to be given to arbitration decisions or a challenge to evidentiary rulings on particular pieces of evidence. This is a challenge to the arbitrator's decision not to allow *any* evidentiary hearing on the only substantive issue in the case. This is indeed an extreme case, but, even if it were the more ordinary dispute that Gorelick tries to describe, it would warrant this Court's review for the reasons set forth in the petition and amplified below.

1. Gorelick opens his argument by addressing an entirely different issue than the question presented in this case. Gorelick cites the Wright & Miller treatise and a string of cases for the obvious proposition that post-dispute agreements waiving the right to appeal are uniformly enforceable. This must be the case, of course, or it would be

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(footnote continued from previous page)

contract resulted in a $1,500 decrease in total compensation due Gorelick; under Gorelick's interpretation, the revision to the contract resulted in a multi-million dollar windfall to Gorelick in payments for technology with respect to which Gorelick has never had, or claimed to have, any intellectual property rights whatsoever.

[3] *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988) (under California law, there is no contract that is "impervious to attack by parol evidence . . . *the court must consider extrinsic evidence of possible ambiguity*") (emphasis added).

nearly impossible to settle any dispute. This Court, however, has long distinguished between post-dispute agreements, which are presumptively enforceable, and pre-dispute agreements, the enforcement of which is far more problematic. *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 479 n.* (1989).[4] This case, as with all the other cases involved in the circuit conflict, concerns pre-dispute agreements, not post-disputes agreements like those cited by Gorelick and Wright & Miller.

2. Gorelick next argues that the particular agreement in this case – to eliminate appellate review granted in § 16 of the FAA – is different from the agreements in the other cases in the particular way in which it alters the statutory judicial review procedure. This is true, but it is irrelevant: these cases feature myriad attempts to tinker with the statutory judicial review procedure, but all turn on the same issue: did Congress intend for parties to be able to alter the federal statutory judicial review procedure? There are three possible answers, and only three: a categorical "yes," a categorical "no," and a case-by-case "it depends on the particular kind of

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[4] In *Rodriguez de Quijas*, this Court overruled *Wilko v. Swan*, 346 U.S. 427 (1953), which had held that *pre-dispute* agreements to arbitrate claims under § 12(2) of the Securities Act of 1933 were void. In overruling *Wilko*, this Court explained:

> The Court [in *Wilko*] carefully limited its holding to apply only to arbitration agreements which are made 'prior to the existence of a controversy.' 346 U.S. at 438 . . . . In contrast, 'courts uniformly have concluded that *Wilko* does not apply to the submission to arbitration of existing disputes.'

490 U.S. at 479 n. *.

agreement." If this Court answers the question with the categorical "yes" or "no," then the resolution of this case will have resolved the conflict once and for all and this case would have been the ideal vehicle to resolve the conflict. In the event this Court takes the case-by-case approach, then this case will have proven superior to any of the other cases because it comes from the Tenth Circuit, the only court that has taken the case-by-case approach. *Compare MACTEC, Inc. v. Gorelick*, 427 F.3d 831 (10th Cir. 2005), *with Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

3. Moreover, there are compelling jurisprudential reasons to reject the case-by-case approach and to reject Gorelick's attempt to distinguish this case on its facts from other cases presenting the identical legal issue. On what possible basis might a court conclude that one agreement altering the statutory prescribed process is better or worse than another? Either the statute should be enforced as written by Congress, or the parties' agreement to the contrary should be enforced. The question is not what process the court believes is best, but which of these competing sources of authority (Congress or private agreement) should be preeminent. The Tenth Circuit's approach introduces a third source of authority -- the court itself. Though in alternating cases the Tenth Circuit is capable of couching its preference in terms of deference to Congress (in *Bowen*) and deference to the agreement of the parties (in this case), the inconsistency in the rationale of the decisions belies the reality that the court is simply enforcing the agreements that it likes and not enforcing the agreements that it does not like. To the Tenth Circuit, even though Congress in the FAA balanced and fixed the role of the courts with respect to the review and approval of arbitration agreements, agreements that reduce the role of the courts from what Congress specified are good and should be

enforced, and agreements that increase the role of the courts are bad and should not be enforced.

Apart from lacking any underlying doctrinal integrity, the case-by-case approach of the Tenth Circuit provides parties and lower courts with no predictable basis upon which to determine in advance whether any given arbitration provision is enforceable. Though MACTEC will argue, based upon the plain language of the statute, that the answer should be a categorical "no," either categorical answer is preferable and more doctrinally consistent than the equivocating and vacuous approach of the Tenth Circuit.

4. Gorelick contends that the agreement in this case does not really alter the statutory judicial review procedures because the appeal provision, Section 16 of the FAA, 9 U.S.C. § 16, does not require parties to appeal, it simply states that parties "may" appeal. This is not persuasive in the least: an agreement providing that the parties "may not" appeal, however, still is directly contrary to the provisions of the FAA stating that the parties "may" appeal.

In sum, a decision by this Court in this case would resolve an important and persistent conflict below and would fit perfectly with recent decisions clarifying the roles of parties, arbitrators and the courts in the important and fast growing field of arbitration. *See Buckeye Check Cashing, Inc.*, No. 04-1265 (Feb. 21, 2006); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989).

The petition for a writ of certiorari should be granted.

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